

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

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SECRETARY RELATIVE

In re:)	1998 OAL Determination No. 10
Request for Regulatory)	
Determination filed by)	[Docket No. 91-006]
COUNTY OF FRESNO)	
concerning "Guidelines for)	July 28, 1998
the Preparation of Hazardous)	
Waste Management Plans" of)	Determination Pursuant to
the DEPARTMENT OF HEALTH)	Government Code Section 11340.5;
SERVICES /DEPARTMENT OF)	Title 1, California Code of
TOXIC SUBSTANCES CONTROL)	Regulations,
_____)	Chapter 1, Article 3

Determination by: EDWARD G. HEIDIG, Director

HERBERT F. BOLZ, Supervising Attorney
LINDA A. FRICK, Senior Staff Counsel

SYNOPSIS

The issue presented to the Office of Administrative Law is whether Guidelines issued by the Department of Health Services, Toxic Substances Control Division concerning hazardous waste management plans are "regulations" and, therefore, without legal effect unless: (1) adopted in compliance with the Administrative Procedure Act ("APA"), or (2) expressly exempted from the APA.

The Office of Administrative Law has concluded that the Guidelines are "regulations," but have been expressly exempted by statute from the APA.

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THE ISSUE PRESENTED¹

The Office of Administrative Law ("OAL") has been requested² to determine³ whether "Guidelines for the Preparation of Hazardous Waste Management Plans" ("Guidelines") issued June 30, 1987 by the Toxic Substances Control Division of the Department of Health Services ("DHS")⁴ are "regulations" required to be adopted pursuant to the Administrative Procedure Act ("APA").^{5, 6}

THE DECISION^{7, 8, 9, 10}

OAL finds that:

1. The APA was generally applicable to the Department of Health Services, Toxic Substances Control Division in 1991 and is generally applicable to the Department of Toxic Substances Control on the date this determination issues.
2. The Guidelines are "regulations" as defined in Government Code section 11342, subdivision (g).
3. The Guidelines fall within an express statutory APA exemption and thus do not violate the APA.

ANALYSIS

I. BACKGROUND

A. The State Agency

The Department of Health Services ("DHS") is a state agency with a wide range of statutory duties.¹¹ The Department has the power to adopt and enforce regulations for the execution of its duties.¹²

In 1972, California enacted the Hazardous Waste Control Law ("HWCL"), which was operative July 1, 1973.¹³ The act provided that the State Department of Health¹⁴ (now known as the "State Department of Health Services") oversee the hazardous waste control program, adopt minimum standards and regulations for the handling, processing, and disposal of hazardous and extremely hazardous

wastes, as defined, to protect against hazards to public health, domestic livestock, and wildlife, and carry out specified enforcement procedures.¹⁵

The Legislature included in the legislation a process for DHS to provide the counties with guidelines for hazardous waste management plans,¹⁶ which were to include the following :

“(A) A listing of types or categories of hazardous wastes that can be used in characterizing the hazardous waste stream in each county or region.

(B) Methods for determining the capacity of the hazardous waste facilities that currently manage the hazardous wastes in the county or region and for assessing the capacity of these hazardous waste facilities to manage these hazardous wastes in the future.

(c) Methods for assessing the need to establish new, or expand existing, capacity for the management of hazardous wastes produced in each county or region.

(D) Methods for estimating the amounts of hazardous waste produced by small businesses and households.”¹⁷

A document entitled “Guidelines for the Preparation of Hazardous Waste Management Plans” was issued by DHS on June 30, 1987.

In 1991, the Governor's Reorganization Plan created the Department of Toxic Substances Control ("DTSC") and transferred responsibility for the HWCL, including hazardous waste management, from the Department of Health Services, Toxic Substances Control Division ("TSCD") to the new department on July 17, 1991.¹⁸ The DTSC succeeded to all other powers and duties of the Toxic Substances Control Division of DHS.¹⁹

B. This Request for Determination

This Request for Determination was filed by the Public Works and Development Services Department of Fresno County ("County"). The County asks whether the Guidelines²⁰ contain regulations as defined in Government Code section 11342, subdivision (g), and thus violate the APA.

II. DISCUSSION

A. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF HEALTH SERVICES AND/OR THE DEPARTMENT OF TOXIC SUBSTANCES CONTROL?

For purposes of the APA, Government Code section 11000 defines the term “state agency” as follows:

“As used in this title [Title 2. Government of the State of California (which title encompasses the APA)], ‘state agency’ includes every *state* office, officer, *department*, division, bureau, board, and commission.” [Emphasis added.]

The APA further clarifies or narrows the definition of “state agency” from that in Section 11000 by specifically excluding “an agency in the judicial or legislative departments of the state government.”²¹ DHS and DTSC are not in the judicial or legislative branch of state government.²² Clearly, DHS and DTSC are “state agencies” within the meaning of the APA.

Both DHS and DTSC have the power to adopt and enforce rules and regulations for the execution of their duties and neither Department is expressly exempted from following the APA.²³ All regulations DTSC inherited pursuant to the Reorganization Plan remain in effect and are fully enforceable by the Director.²⁴

The APA is, therefore, generally applicable to both Departments.

B. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines “regulation” as:

“... *every rule*, regulation, order, or standard of general application or *the amendment, supplement, or revision of any rule*, regulation, order, or standard *adopted* by any state agency *to implement, interpret, or make specific the law enforced or administered by it*, or to govern its procedure [Emphasis added.]”

Government Code section 11340.5, authorizing OAL to determine whether agency rules are “regulations,” provides in part:

“(a) *No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [‘]regulation[’] as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] [Emphasis added.]”*

In *Grier v. Kizer* (1990),²⁵ the California Court of Appeal upheld OAL’s two-part test as to whether a challenged agency rule is a “regulation” as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency’s procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a “regulation” and *not* subject to the APA. In applying the two-part test, however, we are mindful of the admonition of the *Grier* court:

“. . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA’s requirements should be resolved in favor of the APA*. [Emphasis added.]”²⁶

1. Is the challenged rule either a rule or standard of general application or a modification or supplement to such a rule?

For an agency policy to be of “general application,” it need not apply to all citizens of the state. It is sufficient if the rule applies to members of a class, kind or order.²⁷ The Guidelines were prepared by DHS under mandate of state law.²⁸ The Guidelines apply to all counties which elect to design a Hazardous Waste Management Plan under the statutory scheme which mandated that the state prepare these guidelines.²⁹ DHS must approve the county hazardous waste management plan if:

“(1) The plan *substantially complies* with the *guidelines for the preparation of hazardous waste management plans adopted by [DHS]. . .*” [Emphasis added.]³⁰

There is a provision for the disapproval of the plan and its revision which also includes a mandate that the plan must substantially comply with the guidelines.³¹ The June 30, 1987 Guidelines are generally applicable.

2. Have the challenged rules been adopted to implement, interpret or make specific the law enforced by the agency or govern the agency's procedure?

The “Introduction” to the Guidelines summarizes the objective of AB 2948 (Tanner, 1986), under which the Guidelines were issued:

“insur[ing] that safe, effective, and economical facilities for the management of hazardous wastes are available when they are needed, and that these facilities are of a type and operated in a manner, which protects public health and environment.”

The Tanner statute in its entirety consists of 14 pages, including annotations, in West’s Annotated California Codes. The statute³² includes a broad overview, less than one page, of what the guidelines must include, but does not limit DHS from expanding upon the list. The statute³³ does not contain any specific information concerning what the plans or the guidelines for the preparation of the plans should contain. The Guidelines on the other hand, consist of 56 pages of detail: including an Introduction, Responsibility of Local and Regional Government in Hazardous Waste Management Plans (CHWMP), which includes section 2.7, “Department

Criteria for CHWMP Approval.” Content of the County Hazardous Waste Management Plan (CHWMP) and a Technical Reference Manual consisting of fifteen parts. (The Technical Reference Manual was not submitted to OAL by the County as part of the request for determination; thus, it was not reviewed by OAL.) The Guidelines make specific the statute being enforced by DHS.

The Guidelines are “regulations” within the meaning of Government Code section 11342, subdivision (g), because they are generally applicable and they make specific the law enforced by the issuing agency.

C. DO THE JUNE 30, 1987 GUIDELINES FALL WITHIN THE EXPRESS STATUTORY EXEMPTION DEALING WITH PLAN PREPARATION GUIDELINES?

State agency rules which would otherwise be subject to APA rulemaking requirements are sometimes expressly exempted by statute.

In this determination proceeding, DTSC correctly points out that Health and Safety Code section 25135.5 expressly exempts plan preparation guidelines from the APA under specified circumstances. Section 25135.5, subdivision (b), provides in part:

“(b) The department shall do all of the following:

(1) On or before June 30, 1987, after conducting a workshop with county and city government officials and industry and environmental representatives, *prepare and transmit* to counties and regional councils of governments *guidelines for the preparation* and adoption of county and regional *hazardous waste management plans*. [*The APA does not apply to the preparation and transmittal of these guidelines. . . .*] [Emphasis added.]

OAL has reviewed the Guidelines issued by DHS to determine if they fall within the scope of the express statutory exemption. The exemption requires that the Guidelines be issued on or before June 30, 1987. This condition has been satisfied: the Guidelines bear the date June 30, 1987. OAL has reviewed the Guidelines to determine if the content of this document falls within the exemption.

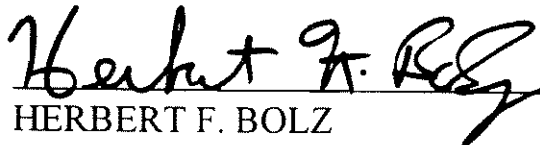
OAL notes that the County has failed to point to any particular parts of the Guidelines document as falling outside the exemption. In reviewing the content of Guidelines, OAL concludes that they fall within the express exemption.³⁴

III. CONCLUSION

For the reasons set forth above, OAL finds that:

1. The APA was generally applicable to the Department of Health Services, Toxic Substances Control Division in 1991 and is generally applicable to the Department of Toxic Substances Control on the date this determination issues.
2. The Guidelines are "regulations" as defined in Government Code section 11342, subdivision (g).
3. The Guidelines fall within an express statutory APA exemption and thus do not violate the APA.

DATE: July 28, 1998


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ENDNOTES

1. The legal background of the regulatory determination program--including a survey of governing case law--is discussed at length in note 2 to **1986 OAL Determination No. 1** (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations) (see endnote 3: *Grier* disapproved on other grounds in *Tidewater*).

In August 1989, a *second* survey of governing case law was published in **1989 OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a *third* survey of governing case law was published in **1990 OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11340.5, and the other opinion issued thereafter.

In January 1992, a *fourth* survey of governing case law was published in **1992 OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

In December 1993, a *fifth* survey of governing law was published in **1993 OAL Determination No. 4** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, No. 2-Z, page 61, note 3.

In December 1994, a *sixth* survey of governing law was published in **1994 OAL Determination No. 1** (Department of Education, December 22, 1994, Docket No. 90-021), California Regulatory Notice Register 95, No. 3-Z, page 94, note 3.

In June 1998, a *seventh* survey of governing law was published in **1998 OAL Determination No. 4** (Department of Fish and Game, June 26, 1998, docket No. 90-049),

2. This Request for Determination was filed on March 1, 1991 by Ann Getz Zimmerman, Resources Manager, on behalf of the County of Fresno ("County"), Public Works and Development Services ("agency"), 2220 Tulare Street, Suite 600, Fresno, CA 93721, (209) 453-5059. Jerry Prieto is the new contact for the agency. A supplemental letter was filed on behalf of the County on October 10, 1997 by Phillip S. Cronin, County Counsel and Michael E. Rowe, Deputy County Counsel in response to the September 30, 1997 letter directed to OAL from the Department of Toxic Substances Control ("DTSC"). No comments were received from the public.

Robert Hoffman, Chief Counsel of DTSC, 400 P Street, 4th Floor, P.O. Box 806, Sacramento, CA 95812-0806, (916) 324-1084, filed a response to the Request on September 30, 1997. Dennis Mahoney of Mr. Hoffman's staff is also a contact (916) 324-0339. A supplemental letter was filed on behalf of DTSC on October 27, 1997.

The Department of Health Services ("DHS") filed a response on April 11, 1991, signed by William F. Soo Hoo, Assistant Chief Counsel and Dennis H. Mahoney, Staff Attorney. A subsequent response was filed by DHS on September 15, 1997 informing OAL that the "Toxic Substances Control Division" formerly in DHS had become the Department of Toxic Substances Control.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

"Determination" means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA."
(Emphasis added.)

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid and unenforceable* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was *"invalid"*). We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except

as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*. Furthermore, *Tidewater* holds that an agency rule issued in violation of the APA is "void," but that agency *action* based upon the voided rule will *not* be automatically invalidated.

In the event regulations were proposed for adoption by the Department under the APA, OAL would review the proposed regulations. The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL *does not* review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

4. In 1991 the Governor's Reorganization Plan No. 1 of 1991 transferred "all the duties, powers, purposes, responsibilities, and jurisdiction of the Toxic Substances Control program of the State Department of Health Services" to the Department of Toxic Substances Control. In addition, the Reorganization Plan provided in section 205 (a) that:

"Any regulation or other action, adopted, prescribed, taken, or performed by any agency or officer in the administration of a program or the performance of a duty, responsibility, or authorization transferred by this act shall remain in effect and shall be deemed to be a regulation or action of the agency or officer to whom the program, duty responsibility, or authorization is transferred."

For purposes of this determination the preparation and transmittal of the Guidelines challenged by the County was an action by DHS deemed to remain in effect upon the transfer to DTSC.

5. This determination may be cited as "1998 OAL Determination No. 10."
6. According to Government Code section 11370:

"*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *Chapter 4.5* (commencing with section 11400), and *Chapter 5* (commencing with Section 11500) constitute and may be cited as, the *Administrative Procedure Act*." [Emphasis added.]

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359. Chapters 4, 4.5, and 5, also part of the APA, concern the Office of Administrative Hearings and Administrative Adjudication, respectively.

7. The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244 (see endnote 3: *Grier*, disapproved on other grounds in *Tidewater*). Prior to this court decision, OAL had been requested to determine whether this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987), CRNR 96, No. 8-Z, February 23, 1996, p. 293. The *Grier* court concurred with OAL's conclusion, stating that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of [a statute] by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration.*" [*Id.*; emphasis added.]

See also *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886 (same holding) and note 5 of **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384 (reasons for according due deference consideration to OAL determinations).

8. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) However, an agency rule found to violate the APA could also simply be rescinded.

9. Pursuant to Title 1, CCR, section 127, this determination shall become effective on the 30th day after filing with the Secretary of State. This determination was filed with the Secretary of State on the date shown on the first page of his determination.
10. Government Code section 11340.5, subdivision (d) provides that:

“Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.”
11. Health and Safety Code section 100100. In 1995, after this Request for Determination was filed, the Statutes related to the Department of Health Services were reorganized. Stats. 1995, c. 415 (S.B. 1360). When the request was filed the citation would have been to Health and Safety Code section 100. Most importantly sections 171 and 172 of Stats. 1995, c. 415 provide:

“Sec. 171. It is the intent of the Legislature in enacting this act to reorganize and clarify portions of the Health and Safety Code and thereby facilitate its administration. The Legislature intends that the changes made to the Health and Safety Code, as reorganized by this act, have only technical and nonsubstantive effect. Hence, no change made by this act shall create any new right, duty, or other obligation that did not exist on the effective date of this act, or result in the limitation or termination of any right, duty, or other obligation that existed on the effective date of this act.”

“Sec. 172. The Legislature finds that the reorganization of the Health and Safety Code pursuant to this act, in view of the nonsubstantive statutory changes made, will not result in new or additional costs to local agencies.”
12. Health and Safety Code sections 100275, 100280. (See previous endnote - previous citation to Health and Safety Code sections 208, 208.3).
13. Statutes 1972, Chapter 1236, added Chapter 6.5, Hazardous Waste Control, to Division 20 of the California Health and Safety Code.
14. In 1971, Statutes of 1971, Chapter 1593, section 56, operative July 1, 1973, designated the State Department of Public Health as the State Department of Health. In 1977, it was designated the State Department of Health Services (Statutes of 1977, Chapter 1252, section 109, operative July 1, 1978).
15. As enacted in 1972, the Hazardous Waste Control Act provided:

“The Legislature finds that increasing quantities of hazardous waste are being generated in the state and that without adequate safeguards for handling and disposal, such wastes can create conditions which threaten the public health and

safety and create hazards to wildlife." Health and Safety Code section 25100.

"The Legislature therefore declares that in order to prevent such hazardous conditions it is in the public interest to establish regulations and to maintain a program to provide for the safe handling and disposal of hazardous wastes." Health and Safety Code section 25101.

16. Health and Safety Code section 25135.5.

17. Id.

18. For Executive Reorganizations, generally, see Government Code sections 12080 - 12081.2

The Governor's Reorganization Plan No. 1 of 1991, "State government reorganization: environmental protection," became effective on July 17, 1991. The plan transferred responsibility for continuing to implement the Hazardous Waste Control Law to the new Department (also see endnote 4), changing the definition of "Department" from the "State Department of Health Services" to the "Department of Toxic Substances Control," (section 100, amending Health and Safety Code section 25111), and "Director" from the "State Director of Health Services" to the "Director of Toxic Substances Control," (section 101 amending Health and Safety Code section 25112). The plan made further appropriate conforming changes to distinguish the responsibilities of the various departments with environmental duties.

DTSC has succeeded to the powers and duties of DHS, Toxic Substances Control Division, in regard to hazardous waste management plans.

19. Government Code section 58004 provides:

"The department [of Toxic Substance Control] succeeds to, and is vested with, all the duties, powers, purposes, responsibilities, and jurisdiction of the Toxic Substances Control Program of the State Department of Health Services, including, but not limited to, those powers and duties specified in *Chapter 6.5 [including Article 3.5, Hazardous Waste Management Plans, sections 25135 to 25135.9] (commencing with Section 25100)*, Chapter 6.7 (commencing with Section 25280), Chapter 6.75 (commencing with section 25299.10), Chapter 6.8 (commencing with Section 25300), Chapter 6.91 (commencing with Section 25410), Chapter 6.92 (commencing with Section 25420), Chapter 6.95 (commencing with Section 25500), and Chapter 6.97 (commencing with Section 25550) of Division 20." [Emphasis added.]

20. This request for determination concerns solely the 1987 Guidelines. This is the only "agency rule" (see 1 CCR 121(c)) that has been challenged in this proceeding. Other documents, rules, and policies have been mentioned in and in some cases attached to the request, the agency response, and a public comment filed by the County; however, this other material was not the subject of the request and has not been reviewed for

compliance with Government Code section 11340.5. The request for determination clearly identifies the Guidelines and only the Guidelines as the "State Agency Rule Subject to Request."

21. Government Code section 11342, subdivision (a).
22. See *Winzler & Kelly v. Department of Industrial Relations* ("Winzler") (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
23. Health and Safety Code sections 58012 et seq. (DTSC), and 100275, et seq. (DHS)
24. Health and Safety Code section 58012, subdivision (b).
25. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
26. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
27. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
28. Health and Safety Code section 25135.5, subdivision (b)(1).
29. Stats. 1986, c. 1504; also see 73 Ops. Cal. Atty. Gen. 78.
30. Health and Safety Code section 25135.7, subdivision (a)(1).
31. Health and Safety Code section 25135.75.
32. Health and Safety Code section 25135.5.
33. Id.
34. In a comment submitted after the request was accepted, the County attempts to revise the request, arguing in substance that OAL should rule that the APA-exempt guidelines may not be enforced by DTSC as though the Guidelines were formal regulations printed in the CCR, that the Guidelines do not have "the force of law as if they were administrative regulations promulgated in accordance with the APA." (Letter of Oct. 10, 1997, p. 2.) This separate legal issue is outside of OAL's jurisdiction under Government Code section 11340.5. OAL's inquiry is limited to determining whether the challenged Guidelines were issued in violation of the APA. The separate issue of whether the APA-exempt Guidelines have the force of law is more properly a question for the Attorney General's Opinion Unit or for the courts.